Pentre Electric, Inc. *and* International Brotherhood of Electrical Workers Local 648, AFL–CIO. Cases 9–CA–27773–3, 9–CA–27825, and 9–RC–15721

December 19, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 22, 1991, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pentre Electric, Inc., Hamilton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held in Case 9–RC–15721 on August 20, 1990, is set aside and the case is remanded to the Regional Director for Region 9 for the purpose of conducting a second election.

[Direction of Second Election omitted from publication.]

[1] In the absence of exceptions, we adopt, pro forma, the judge's findings that the vice president's speech to employees on June 13, 1990, and the alleged threats to employees by supervisors did not violate the Act.

The Respondent argues that the judge improperly amended the complaint and found a threat of plant closing that was neither alleged nor investigated. We find that this violation was within the scope of the original complaint which alleged threats of layoff and loss of work, was based on the Respondent's witness' direct testimony, and was fully litigated.

Eric A. Taylor, Esq., for the General Counsel.
Brett L. Thurman, Esq., of Dayton, Ohio, for the Respondent.
Mr. Richard C. Von Stein, of Hamilton, Ohio, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, Pentre Electric, Inc. (Pentre), is an electrical contractor. The Charging Party, IBEW Local 648 (the Union), conducted an election campaign among the 19 employees in the bargaining unit at Pentre.[1] But at the Board-run election on August 20, 1990, a majority of the bargaining unit employees voted against the Union. (All the events I refer to in this decision occurred in 1990, unless I indicate otherwise.)

The General Counsel alleges that, in the months prior to the election, Pentre supervisors made statements that violated Section 8(a)(1) of the National Labor Relations Act (the Act) in various respects.

The Union filed timely objections to the conduct of the election and to conduct affecting the results of the election. Some of the objections were overruled. The others raised the same factual issues as the General Counsel's unfair labor practice allegations and, accordingly, the hearing on those objections was consolidated with the hearing in the unfair labor practice case.

I heard the matter in Cincinnati on January 29, 1991.[2]

A. *Meehan's Speech to Pentre Employees on June 13*

On June 13 Pentre called all its personnel—supervisors as well as employees—into a meeting in its warehouse. During part of the meeting Pat Meehan addressed the employees. Meehan is one of Pentre's two coowners and is its vice president. Meehan had heard that the Union was attempting to organize Pentre. Meehan's intent was to convince the employees that they would be better off without the Union.

The General Counsel claims that, in the course of Meehan's speech, he threatened Pentre's employees with layoff if they voted in favor of the Union.

During his talk Meehan discussed, among other things, the impact of union-imposed standards on the employees and the effect of unionization on Pentre's personnel practices.

As regards union standards, Meehan indicated that a number of Pentre's employees might not meet the Union's standards for journeymen electricians and that he doubted that all of those who failed to qualify would want to undertake the schooling necessary to become journeymen. He suggested that that might mean that the Union would not allow those employees to continue to work for Pentre.

As regards the impact of unionization on Pentre's personnel practices, Meehan said that Pentre had always tried to keep its employees employed year-round. A reason for that, Meehan said, was that the Company did not have a pool of electricians available to it for short term employment. With unionization, Meehan continued, that would change. Unionized contractors tend to keep some top-notch electricians employed year-round. But since a pool of electricians is available (from the Union's hiring hall), Meehan said, there is no

[1] Pentre admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization. The bargaining unit: ''All full-time and regular part-time journeymen, apprentices, helpers and supply house employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.''

[2] The charges in Cases 9–CA–27773–3 and 9–CA–27825 were filed on August 20 and September 4, respectively. The consolidated complaint issued on October 23. The order directing a hearing in Case 9–RC–15721 and consolidating it with the unfair labor practice hearing issued on December 3.

incentive for a unionized employer to try to keep its entire workforce employed on a permanent basis. That meant that some Pentre employees who then worked for the Company year-round might work for Pentre only sporadically. And, said Meehan, as he understood the way union hiring halls work, that could mean that the employees would spend half the year unemployed.

Turning first to Meehan's claims about the adverse impact of the Union's standards on some employees, it seems to me that the subject of union-employee relationships is a fair target for attack by employers. For one thing, employer predictions of a decline in the well-being of employees due to action by the Union cannot reasonably be considered threats of action against the employees by the employer. Secondly, unions are in a particularly good position to reply effectively to those kinds of contentions by employers. Thus I conclude that Meehan's discussion of the impact on the employees of the Union's standards did not violate the Act whether or not that discussion accurately reflected the facts.

Meehan's prediction that unionization would result in some of its employees spending half of every year unemployed raises more difficult questions.

What Meehan said, essentially, was that if, on the one hand, Pentre had to pay union wages and benefits to its employees and, on the other, Pentre had access to the Union's hiring hall, it would not make economic sense for Pentre to attempt to keep as a permanent staff all of the electricians it would need for all of the work it expected to have. And, that being the case, Pentre would not make that attempt. Rather, Pentre would look to the pool of electricians available at the union's hiring hall for the Company's job-by-job needs. That, in turn, would eventuate in Pentre laying off some of its employees under circumstances in which, if the Company were not unionized, the employees would remain employed. As to the employment opportunities of the laid-off employees, that would depend on the hiring hall situation which, Meehan believed, could mean employment only 6 months out of every 12.

One subissue is whether Meehan improperly assumed that unionization would mean some specified level of wages and benefits. See, in this regard, *McDonald Land & Mining Co*., 301 NLRB 463 (1991). But in the course of his talk Meehan did discuss what set of wages and benefits he thought the Union would demand and, indeed, admitted to the employees that such remuneration compared favorably to the employees' current pay. (The testimony of union official Von Stein agreed with Meehan's statements to the employees regarding what demands the Union would make on Pentre if the employees voted in favor of unionization.)

As to Meehan's layoff predictions themselves, an employer, says *Gissel*,[3]

> may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

In a sense, a switch in Pentre's employment tactics stemming from its work force becoming unionized was not ''beyond its control.'' Pentre could have, after all, continued to try to keep its work force employed on a permanent basis even had the employees voted in favor of unionization.

On the other hand, no employee could reasonably have come away from the speech with the belief that the predicted layoffs would be the product of union animus on the Company's part.

Moreover the economics of the situation were indeed beyond Pentre's control. Pentre's existing employment tactics were predicated on the fact that it paid less than scale. If the Company began paying union level remuneration, the Company's situation relative to its employees would change in a variety of ways, one of which would be having access to the pool of employees in the Union's hiring hall. Pentre, said Meehan, ''would love to be able to just call up and say, 'send me 200 guys.''' Under the circumstances, layoff from Pentre upon unionization of the Company's work force was a likelihood for at least some of Pentre's employees. Meehan was speaking factually in that respect.

Meehan's statement that some employees who worked out of the Union's hiring hall would work as little as 6 months out of the year is another matter. The evidence in this proceeding suggests that he was wrong about that. But his allegations in that respect were not about Pentre—they were not, in *Gissel*'s words, ''a prediction as to the precise effects he believe[d] unionization [would] have on his company.'' Rather, they were about the overall rate of employment of electricians using the hiring hall to obtain work. Again, the Union had the facts in that respect and could readily have responded to Meehan's claims.

I conclude that Meehan's speech on June 13 did not violate the Act in any respect. See generally *Atlantic Forest Products*, 282 NLRB 855 (1987).

B. *Supervisor Tim Kennedy's Threats*

Ed Farmer worked for Pentre, as a journeyman electrician, until August 1990 (when he quit). Throughout the Union's campaign at Pentre, Farmer was demonstrably prounion; he wore union insignia and overtly handed out authorization cards.

Tim Kennedy is a Pentre foreman. The Company admits that Kennedy is a supervisor within the meaning of the Act.

One of the companies that Pentre was providing services to during the spring of 1990 was Boise Cascade. Farmer and coemployee Thielman were part of Kennedy's crew at the Boise Cascade jobsite until sometime in May. Pentre then switched the two employees to another jobsite. But about June 11 the Company reassigned Farmer and Thielman to Kennedy's crew at Boise Cascade.

When Farmer and Thielman arrived at the Boise Cascade jobsite on the first day of their reassignment, Kennedy turned to them and said, ''Haven't they fired you clowns yet?'' Farmer testified that he took that as a reference to his prounion activities. Kennedy testified his remark had nothing whatever to do with the Union; rather, it was his joking way of acknowledging the return of the two employees to the jobsite and a dig at the employees for what he considered a deliberate failure on the employees' part to complete their work when they were last at the Boise Cascade jobsite.

Farmer testified that Kennedy repeated the remark on subsequent days. But I credit Kennedy's testimony that he uttered the remark only once.

[3] *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969).

Some of the employees on Kennedy's crew were antiunion. Farmer and some others were prounion. The two sides spent a lot of time, on the job, discussing the upcoming election. Productivity fell. On several occasions Kennedy responded by telling the employees (both prounion and antiunion) to get back to work and that if they wanted to talk about the Union they should do it on their own time, not the Company's. Finally, on June 18, when, once again, Kennedy's crew was debating unionization instead of working, Kennedy told them something on the order of, ''if you don't stop talking about the Union and go back to work I'm going to run you off the job.'' (Farmer testified that Kennedy's words were, ''If you guys have any more union talk on the job, I'm going to run you off before lunch.'' It may well be that that was what Kennedy said.)

Farmer, who was part of that crew, took that as a threat that he would be fired if he did not stop speaking in favor of the Union.

The General Counsel argues that by reason of Kennedy's ''haven't they fired you clowns yet'' remark and his threat to run the employees off if they continued their ''union talk,'' Pentre violated Section 8(a)(1) of the Act.

I recommend that those allegations of the complaint be dismissed.

As for Kennedy's ''clowns'' comment, a reasonable employee would have recognized that there was no basis for connecting it to the employee's prounion position.

As for Kennedy's threats regarding the employees' talking about the Union, the employees were talking (pro and con) about the Union, they were doing so during worktime, and they were working less effectively than they should have been because of that talking. Kennedy was entitled to deal with that interference with work by threatening the employees with discipline.

C. *Supervisor Jim Adams' Threats*

Charles Mendez began working at Pentre in November 1989 and immediately began trying to organize the Company's work force on behalf of the Union. His efforts were not covert. For instance, Mendez frequently wore union insignia.

Jim Adams is a Pentre foreman and an admitted supervisor. During the course of the Union's campaign Mendez worked on Adams' crew.

According to Mendez, Adams interrogated him about his union sympathies and about whether he had signed an authorization card. But Adams denied doing either and I credit that denial.

Adams does not deny telling the employees in his crew that unionization could be disasterous for the employees.

For one thing, Adams referred to the Union's standards for qualifying as a journeyman electrician and questioned whether the employees could qualify.

For another, Adams told the employees that as he understood the Union's rules, the Union would give job preference to ''them good old boys down there at the hall,'' with the result that ''we [Adams himself as well as the employees he was talking to] are going to be sitting at home.'' In other words, said Adams, if the Union came in, the electricians currently working for Pentre would ''be out of work'' because of the Union's own rules.

Meehan, in his June 13 speech, claimed that the Union's own rules would adversely effect Pentre's employees if the employees voted in favor of unionization. Adams' statements to the employees did not precisely track Meehan's. But they made the same point: the Union's rules might cost the employees their jobs or, at least, months-long layoffs. I conclude that, for the reasons that Meehan's speech did not violate the Act, the allegations concerning Adams' utterances also should also be dismissed.[4]

D. *Luff's Speech to Employees*

Phil Luff is a coowner of Pentre and is the Company's president. On July 24, he gave a speech to the Company's employees that was intended to dissuade Pentre's employees from voting in favor of unionization. According to the General Counsel, in the course of that speech Luff threatened the employees with loss of work if they voted in favor of the Union.

One of the main topics of Luff's speech was the impact of Pentre's unionization on its ''customer base.'' What Luff told the assembled employees was that (according to Luff's testimony) ''our customers''—whom he named—''don't use union contractors.'' Luff went on to say that, because of that circumstance,

> we would not have the same customer base if we went union. I don't know how we would go about getting another customer base. I'm certain that Pat [Meehan] and I would probably succeed—we're too young to quit, but . . . we would not have the jobs we have now if we had been union [and] it would be very difficult to get work if we were union.

The message Luff conveyed was that because of the customers' preference for nonunion contractors, Pentre in the very least would suffer a serious decline in the volume of its business. That, in turn, would reduce the number of employees Pentre needed. And a shutdown of the Company was a possibility.

Nothing in the record confirms Luff's claim that Pentre's customers did not use union contractors. (Meehan made the same claim, as I will discuss in the next section of this decision. But that is hardly confirmation of Luff's statements.)

I have no doubt that Luff firmly believed that what he said about the nonunion preferences of Pentre's customers was the fact. And if Luff's beliefs about his customers' preferences were accurate, information about those preferences and their impact on future employment possibilities at Pentre would be useful for the Pentre employees to have when they voted on whether they wanted to be represented by the Union. Additionally, Luff's contentions should have been easy for the Union to respond to—the Union's officials surely are knowledgeable about which businesses in the area are favorably disposed to unionized electrical contractors and which are not.

On the other hand, it is all too easy for managers of nonunion companies to convince themselves that their customers are willing to do business only with nonunion companies. Moreover, depending upon the precise words (and intonation) used when communicating to employees about customers'

[4] The complaint alleges, inter alia, that Adams told employees that Pentre would not sign a contract with the Union. But the record fails to sustain that allegation and on brief the General Counsel does not know that Adams uttered any such threat.

nonunion preferences, that kind of contention can be the equivalent of telling employees that they should reject unionization because of the customers' union animus.

In any event, Board has held that when statements of the kind uttered by Luff become the subject of an 8(a)(1) claim, the company must present evidence confirming the accuracy of such statements in order to avoid a finding that the company violated the Act. *Long-Airdox Co*., 277 NLRB 1157 (1985). Accord: *Gupta Permold Corp*., 289 NLRB 1234, 1252 (1989). Because the record contains no confirmation of Luff's claims about the unwillingness of Pentre's customers to do business with union contractors, I conclude that Luff's statements in that respect violated Section 8(a)(1) of the Act.[5]

E. *Meehan's Talks to Employees in August*

In the week before the election Meehan met with about 10 of Pentre's employees in one-on-one conversations. Meehan's purpose was to convince the employees to vote against unionization. One of the employees with whom Meehan spoke was Charles Mendez. The General Counsel alleges that in the course of Meehan's conversation with Mendez, Meehan interrogated Mendez about the union activities and sympathies of Mendez and his fellow employees.

Mendez did testify to that effect. But Meehan denied any such conversations and I credit Meehan, not Mendez.

But it is clear that Meehan spoke to each of the 10 employees about how ''all of [Pentre's] large customers were almost strictly open shop companies.'' Meehan went on to tell the employees that ''some'' of Pentre's customers—

> did do work with unions. That's fine. That simply means that they're free enterprise and so am I. But for the most part it was open shop and some of our very good [customers] were very involved in the open shop industry . . . associations and the like. So it would be difficult to maintain those particular customers if we were a union contractor, and then, if we were a union contractor, we'd have to establish new customers.
>
> I really don't want to go through that again. That's exactly where I was seven years ago when we started Pentre Electric . . . trying to knock on doors, [make] cold calls, and establish the company, and I'm not prepared to do that again.

Meehan's utterances on the subject were thus similar to Luff's, but even more threatening to the employees. The exacerbation stemmed from Meehan's stated position that Meehan was ''not prepared'' to search for new customers when Pentre's existing customers ended their relationships with Pentre because of the Company's unionization. Unionization, that is to say, would result in Pentre closing its doors.

While the complaint makes no allegations regarding this facet of Meehan's talks with employees in August, the matter obviously was litigated. For the reasons discussed in connection with Luff's speech, I conclude that Meehan's talks in August with Pentre employees violated Section 8(a)(1) of the Act.

F. *Recommended Disposition of the Representation Case*

Although there are exceptions to the rule, ''the Board's general policy is to set aside an election whenever an unfair labor practice occurs during the critical period.'' *Video Tape Co*., 288 NLRB 646 (1989).

The Union filed its election petition on June 22. The election was conducted on August 20. Within that period Pentre violated the Act in two respects—by reason of Luff's speech to Pentre's assembled employees about the impact of unionization on Pentre's customer base and of Meehan's talks to approximately 10 employees about the same subject.

I conclude that those unfair labor practices sufficiently interfered with the employees' freedom to select a bargaining representative to require setting aside the election in Case 9–RC–15721 and that the case should be remanded to the Regional Director for Region 9 with directions to conduct a new election at an appropriate time.

THE REMEDY

The accompanying recommended Order requires Pentre to cease and desist from the commission of unfair labor practices of the kind that I have concluded Pentre committed and to take certain affirmative action necessary to effectuate the policies of the Act.

The recommended order also sets aside the election held on August 20 and remands Case 9–RC–15721 to the Regional Director for Region 9 for the purpose of conducting a new election at such time as he deems that circumstances permit a free choice of bargaining representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Pentre Electric, Inc., Hamilton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Conveying to employees that unionization will result in the loss of the Company's customers and loss of jobs.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Hamilton, Ohio, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative,

[5] Somewhat as Meehan did in his speech in June, Luff also spoke about how the availability to Pentre of a union hiring hall, coupled with union rules regarding referrals from its hiring hall, might mean layoffs for some Pentre employees.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER RECOMMENDED that the election held in Case 9–RC–15721 on August 20, 1990, be set aside and the case remanded to the Regional Director for Region 9 for the purpose of conducting a new election.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT convey to our employees that unionization will result in the loss of the Company's customers and loss of jobs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

PENTRE ELECTRIC, INC.